BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent/Intervenors.	**REPLY MEMORANDUM ON REQUEST FOR RECONSIDERATION** Docket No. 2009-019 Cause No. C/025/005

Pursuant to the Board's Order dated May 8, 2013, Alton Coal Development, LLC ("Alton") submits this Reply Memorandum on its Request for Reconsideration, advising the Board of the reasons why its Order on the legal standard governing fee awards will be unfair and unlawful if applied to Alton's fee petition.

I. THE BOARD'S DECISION WILL BE UNLAWFUL BECAUSE IT FAILS TO GIVE LEGAL EFFECT TO THE REPLACEMENT OF UTAH'S FORMER COAL PROGRAM RULES

Rule B-15 is legally inoperative because, as argued at length in Alton's prior briefing, that rule has not appeared in any version of the Utah Administrative Code for over 30 years. Further, Rule B-15 was repealed and replaced by new procedural rules which are presently codified in the Utah Administrative Code. The Board's adherence to old Rule B-15 is directly contrary to the dictates of the Utah Administrative Rulemaking Act ("UARA"), which was adopted *prior* to the complete repeal and replacement of the Utah

coal program rules in 1990. See Alton's Reply on the Legal Standard Governing Fee Petitions at 3-5; Utah Code Ann. §§ 63G-3-202(1), -201(3), -502(2)(a), -701, 702(3).[1]

Petitioners make much of their claim that Alton has not shown that Rule B-15 was intentionally removed from the administrative code. Likewise, although they continually refer to the disappearance of Rule B-15 as "inadvertent," Petitioners have come forward with no evidence demonstrating that the disappearance was in fact inadvertent. The few known facts concerning the rule's disappearance are undisputed: Rule B-15 was adopted by the Board in 1980 and approved by the Secretary the following year; Rule B-15 disappeared from the administrative code in 1982; the Utah Coal program rules were completely repealed and replaced in 1990; Rule B-15 was not included in the revised rules, which were approved in whole by the Secretary the same year; no version of Rule B-15 has been published in the administrative code since the complete repeal and revision.[2] Determining the legal impact of these facts does not hinge upon which party bears the burden of persuasion in the present case. Instead, determining the effect of these facts is a pure question of law.

More important, however, is that the Board would unlawfully fail to give legal effect to its complete repeal and replacement of earlier rules with the present Rules of

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[1] The Division's argument that Alton's request for reconsideration is not appropriate because the Board's decision is not a final order is, quite simply, incorrect. Even if the Board's order is not final, the Board retains jurisdiction to revise or modify existing orders. See R641-110-500; Alton's Request for Reconsideration at n. 1.

[2] Petitioners argue that Utah Code Ann. § 63G-3-502, mandating annual reauthorization of all administrative rules, is inapplicable to Rule B-15 because "it falls under the exception for rules 'explicitly mandated by a federal law or regulation.'" Opposition Br. at 1-2 (quoting § 63G-3-502(2)(b)(i)). However, Petitioners fail to point to any "federal law or regulation" "explicitly mandate[ing]"the bad faith standard contained in B-15. UMCRA's statutory fee-shifting provision mirrors SMCRA's, which contains no such standard. Utah Code Ann. § 40-10-22(3)(e); 30 U.S.C. § 1275(e). Neither SMCRA nor its permanent program rules mandate a bad faith standard identical to Rule B-15's. 43 C.F.R. § 4.1294(d) applies a bad faith standard to proceedings before the Interior Board of Land Appeals ("IBLA") which is not explicitly mandated under state coal programs. This IBLA procedural rule is not included in the SMCRA permanent program rules at 30 C.F.R. Part 701.1 or an explicit mandate for state primacy.

Practice and Procedure. As a matter of law, a complete replacement is just that—complete. See argument and citations in Alton's Request for Reconsideration at 3-4. Moreover, when a statute which incorporates another statute by reference is repealed or amended, the referenced statute, even if not itself repealed, is no longer applicable. 1A Singer & Singer, Sutherland Statutory Construction § 28:13 (2009 New Ed.). Utah's initial Coal Program consisted of the UMC/SMC rules, which incorporated the Minerals Program's former "M" rules by reference, which in turn incorporated the Board's former "B" rules, again by reference. When the Board completely repealed and replaced the Coal Program rules, the new rules (now in a single location) incorporated by reference new procedural rules which did not include B-15. OSM was provided with Utah's new rules, announced that it would thoroughly review them for compliance, and approved them, again as a complete replacement. It simply is not necessary, as NRDC urges, that Alton prove that the Board, and OSM, were affirmatively conscious of Rule B-15's absence from the body of rules it was replacing. The Board affirmatively stated that it was "complete[ly] replac[ing]" the former rules, and this statement must be given effect. Alton's Request for Reconsideration at 4.

Simply repeating that Rule B-15's disappearance from the administrative code was "inadvertent" does not make it so. The reasons for the rule's initial 1982 disappearance are irrelevant. What is relevant is that the 1990 repeal and replacement of the coal program rules conclusively establishes that, even if Rule B-15 were somehow still effective at that time, it, along with the rest of the prior coal program rules, were completely repealed and replaced.[3] Alton strongly urges the Board to ignore Petitioner's attempt to cast the rule's

[3] Alton's Memorandum of Supplemental Authority demonstrates that the 1990 revision of the Utah coal rules was complete. Correspondence between Utah and OSM repeatedly identified it as a complete

disappearance as an accident without any evidentiary support, and instead requests that the Board focus on determining the legal effect of Rule B-15's longstanding absence from the administrative code, *i.e.*, that under the UARA, Rule B-15 is legally inoperative as a matter of law.[4]

II. THE BOARD'S DECISION IS UNFAIR BECAUSE IT HOLDS FEE PETITIONERS TO A PREVIOUSLY UNKNOWN AND UNPUBLISHED STANDARD

The Board's application of Rule B-15 is unfair because the rule was not published, made available, or identifiable to a person of ordinary intelligence. Due process, rooted in concepts of fundamental fairness, requires that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Utah applies this standard to administrative rules, stating "[i]t is the responsibility of the administrative body to formulate, publish and make available to concerned persons rules which are sufficiently definite and clear that persons of ordinary intelligence will be able to understand and abide by them." Athay v. Dep't of Bus. Reg., 626 P.2d 965, 968 (Utah 1981).

UARA implements the standard set forth in *Athay*. For instance, UARA directs each agency to "maintain a current version of its rules" and make them available for public inspection. Utah Code Ann. § 201(1)(a)-(b) (2013). Similarly, UARA requires the Division of Administrative Rules to "compile, format, number, and index *all effective rules* in an administrative code, and periodically publish that code." Utah Code Ann. § 402(1)(g)

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replacement. See Attachments 4 and 6 to Alton's Memorandum of Supplemental Authority (confirming that the new rules are intended to completely replace the former rules); R641-100-100.

[4] If Rule B-15 were still operative, it would be unnecessary to initiate a new rulemaking to adopt the proposed R645-100-900, which contains the a fee shifting standard similar to that in uncodified Rule B-15. See Alton's Request for Reconsideration at 7 and exhibits cited therein.

(emphasis added). These procedures, along with others in UARA, ensure that clear, intelligible administrative rules are published and made available to concerned persons.

The idea that the old, uncodified Rule B-15 can be enforced against litigants defies the principles of basic fairness. Rule B-15 has not appeared in the Utah administrative code for over 30 years and evidence of its one-time existence is located in federal archives beyond the State boundaries. At the very least, parties to administrative proceedings and associated litigation must be provided with notice of the rules to which they and other parties will be held. Here, the only way for Alton to have known about the existence of Rule B-15 was to search the OSM archives in Denver, Colorado. This result is fundamentally unjust and runs contrary to sound judicial policy.

Application of the uncodified Rule B-15 violates the basic tenet of procedural fairness that a person must receive fair notice of conduct that is forbidden or required. Under the position advanced by NRDC and the Division, not only must a party before the Board examine the law as it appears in the official codes, it must also satisfy the Board that a provision formerly appearing, but now absent from the code, was intentionally omitted. This must be followed by an investigation into whether officials, commenting on and approving a revision or omission, really meant what they said. On balance, the equities in the present case favor Alton, who had no reasonable notice of uncodified Rule B-15, which is now being enforced against it. Reliance on old Rule B-15, even if its omission were inadvertent, is unlawful, unfair and contrary to the specific mandates of the UARA.

RESPECTFULLY SUBMITTED this 24th day of May, 2013.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **REPLY MEMORANDUM ON REQUEST FOR RECONSIDERATION** were e-mailed on the 24th day of May, 2013, to the following:

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